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10 Attorneys for Defendant JAMES ARTHUR RAY

11 SUPERIOR COURT OF STATE OF ARIZONA
12 COUNTY OF YAVAPAI

13 STATE OF ARIZONA,

14 Plaintiff,

15 vs.

16 JAMES ARTHUR RAY,

17 Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**NOTICE OF INTENTION TO
CONTINUE TO REPRESENT
INDIGENT DEFENDANT JAMES A.
RAY PRO BONO ON APPEAL**

19
20 The undersigned attorneys representing Defendant-Appellant James Arthur Ray hereby
21 file this notice stating that, in light of Mr. Ray's indigency, they intend to continue to represent
22 Mr. Ray pro bono on appeal.¹ Accordingly, Mr. Ray will not be seeking appointment of counsel
23 at state expense at this time. Mr. Ray continues to seek indigent status under Arizona Rule of
24 Criminal Procedure 31.5(a)(2) in order to cover any expenses for a certified copy of the record
25 and the certified transcript.
26

27 ¹ Mr. Ray also anticipates associating in additional pro bono appellate counsel from Munger, Tolles &
28 Olson LLP in the Court of Appeals.

1 As set forth below, this arrangement comports with Arizona Rule of Criminal Procedure
2 31.5 and assures that Mr. Ray's constitutional rights are respected.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 Arizona Rule of Criminal Procedure 31.5 permits a "defendant who did not proceed as an
5 indigent in the trial court" to "so proceed on appeal by filing in the trial court a request to proceed
6 as an indigent, together with the sworn questionnaire required by Rule 6.4(b)." Ariz. R. Crim. P.
7 31.5(a)(2). This request is governed by "the standard set forth in Rule 31.5(a)(1)." *Id.* Under
8 Rule 31.5(a)(1), a criminal defendant's indigent status for purposes of his appeal depends on
9 whether he is "able to employ counsel *and* pay for a certified copy of the record on appeal and the
10 certified transcript." Ariz. R. Crim. P. 31.5(a)(1) (emphasis added).

11 As Mr. Ray's Rule 6.4(b) questionnaire demonstrates, he is able to do neither. With assets
12 of \$2,000 and listed debts of over \$11,000,000, Mr. Ray is patently unable to pay even the
13 comparatively modest cost of the certified copy of the record and certified transcript, respectively.
14 Nor is he able to "employ" counsel within the meaning of the Rule, because "employment"
15 entails payment. Accordingly, the Court should find that Mr. Ray is entitled to proceed as an
16 indigent on appeal.

17 The undersigned attorneys seek to clarify, however, that Mr. Ray is not requesting
18 appointment of counsel at this time, nor are the undersigned attorneys requesting that they be
19 permitted to withdraw. Rather, in light of Mr. Ray's indigency, the undersigned attorneys will
20 continue to represent Mr. Ray pro bono.

21 As an indigent defendant, Mr. Ray has a constitutional right to representation by private
22 trial counsel if (as is true here) that counsel is willing to proceed pro bono. *See Robinson v.*
23 *Hotham*, 211 Ariz. 165, 118 P.3d 1129 (Ariz. Ct. App. 2005). In *Robinson*, an indigent
24 defendant's family hired California counsel (along with a local private attorney acting at their
25 direction) to represent him. The trial court held that "when a criminal [defendant] has been
26 determined to be indigent and counsel has been appointed for him," as it had been there, "he
27 doesn't have the constitutional option of having a family hire another lawyer and [having] that
28 other lawyer be his lawyer in charge." *Id.* at 1131-¶ 6. The Court of Appeals reversed, holding

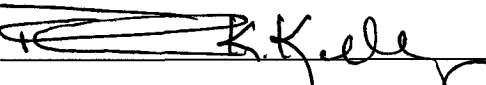
1 that "an indigent criminal defendant possesses rights under the Sixth Amendment and [the
2 Arizona Constitution] to choose representation by non-publicly funded private counsel unless
3 reasons of judicial administration, justice, or other special circumstances outweigh this right," *Id.*
4 at 1133 ¶ 16; *see id.* at 1133 ¶ 13 (noting that it makes no difference if private counsel is retained
5 through "the generosity of family or friends, or through the volunteer efforts of counsel").
6 Accordingly, Mr. Ray is entitled to proceed with his chosen pro bono counsel on appeal.

7 Because he is indigent, Mr. Ray is still entitled under the Rules and the Constitution to
8 have the State pay for the costs of the record and the transcript on appeal. *See* Ariz. Rules Crim.
9 P. 31.8(d) (only non-indigent defendants must pay for transcript); *Britt v. North Carolina*, 404
10 U.S. 226, 227 (1971) (stating that there is "no doubt that the State must provide an indigent
11 defendant with a transcript of prior proceedings when that transcript is needed for an effective
12 defense or appeal").

13
14 DATED: January 4th, 2012

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19 By: 
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21 Copy of the foregoing delivered this 4th day
22 of January __, 2012, to:

23 Sheila Polk
24 Yavapai County Attorney
25 Prescott, Arizona 86301

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27 by 

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